RECEIVED
FEB 16 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 73-6733

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

ORIGINAL CO.

GEORGE HERNAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

BEST COPY AVAILABLE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-6336

GEORGE HERMAN ROGERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 871 unconstitutionally punishes pure speech; that his comments were "political hyperbole" rather than "true threats" against the President; that the court used an incorrect standard to determine the willfulness of the threats; and that he could not properly be charged with separate counts for repeating the threats in response to police questions.

Following a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of five counts of threatening to inflict bodily harm on the President, in violation of 18 U.S.C. 871. He was sentenced to five years' imprisonment on each count, to be followed by five years' supervised probation on the condition that he join Alcoholics Anonymous. The sentence on the last four counts was to run concurrently and "to be suspended during good behavior" (Tr. 196). He is presently imprisoned, serving the sentence imposed on count one, which is subject

BEST COPY AVAILABLE

to the early parole eligibility provisions of 18 U.S.C. 4208 (a)(2).[1] The court of appeals affirmed on January 14, 1974 (Pet. App.). The petition for a writ of certiorari was not filed until March 2, 1974 and is thus out of time under Rule 22(2) of the Rules of this Court.

At approximately 6:15 in the morning of March 24, 1972, petitioner entered the dining area of a Holiday Inn in Shreveport, Louisiana (Tr. 23-24). He began acting in an "odd" manner, laughing boisterously and attempting to engage others in conversations (Tr. 14). The gist of his comments was that he was upset with President Nixon over his upcoming trip to Peking and accordingly intended to go up to Washington to "whip Nixon's ass" or "to kill him in order to save the U. S." (Tr. 8, 9, 41, 57).[2] Petitioner also indicated that he was Jesus Christ and that part of the misgivings he felt over the President's impending trip to Peking stemmed from the fact that the Chinese had a bomb that only he was aware of and which they might use on us (Tr. 8).

According to a waitress, petitioner "wasn't making a lot of sense" (Tr. 8), but she was not "scared by his remarks" until he offered to buy her "pink pants" (Tr. 19). At trial, when asked if she believed petitioner was serious in making the above statements, the dining room cashier testified, "He wasn't laughing. I thought he might." (Tr. 53).

1/ On June 11, 1974, the district court reduced petitioner's sentence to three years' imprisonment on each count. At oral argument before the court of appeals, the government had indicated that it would not oppose a motion for reduction of sentence.

2/ The basis of the first three counts of the indictments were similar threats made in the presence of a waitress, cashier and customer.

The waitress testified that she asked the cashier to call the police in order to get petitioner out of the dining room (Tr. 18-19). When Officer Page (who responded to a radio call that there was a disturbance at the Holiday Inn) arrived, he asked the waitress what the disturbance was, and, when informed, he confronted petitioner (Tr. 77-78). The following colloquy occurred, which was the basis of count four (Tr. 79-80):

> [Officer Page] * * * I said, "Did you make any reference to the President or make any threats to the President?"
>
> He said he didn't like the idea of the president going over and making friends with our enemies and they were going to take over the country and he didn't have to make friends with them and he was going to Washington. He said "I'm going to Washington and I'm going to beat his ass off. Better yet, I will go kill him."

Officer Page also testified that, while he was not scared by petitioner's remarks, he was "shook up" because "* * * we had Presidents assassinated and attempted assassinations and I didn't know whether he was mad or whether he meant it." (Tr. 95-96). Officer Page then took petitioner to police headquarters, where a Detective Burson interrogated petitioner. According to Page, Burson then told him to take petitioner to the V. A. hospital and place a "hold" on him, which he did (Tr. 94-95).

Detective Burson testified that he interrogated petitioner, who informed him that he was upset over the impending presidential trip to China and that he was going to "whip President Nixon's ass" (Tr. 102). This was the basis of count five. Burson testified that he then had Page release petitioner (Tr. 105-107).

Petitioner did not testify, but he called two witnesses who indicated that he had been drinking from around 9:00 a.m. until around 9:00 or 10:00 p.m. on the day before the incident (Tr. 128-132, 135-140). However, each of the witnesses who had been present when petitioner threatened the President indicated that he or she did not believe he was drunk (Tr. 10, 27, 52, 71, 103), although two of them admitted that their initial impression was that he was intoxicated (Tr. 43, 51, 58), and the arresting officer stated that he noticed a faint smell of alcohol on petitioner's breath (Tr. 81).

The jury retired at 3:00 p.m. At 4:55 they sent out a note which asked "will the court accept the verdict -- 'Guilty as charged with extreme mercy of the court?'" The court instructed the marshal to answer "in the affirmative" (Ct. of Appeals Record, Vol. I, 18); the jury then (5:00 p.m.) returned with a verdict of "guilty with extreme mercy" (Tr. 192).

1. 18 U.S.C. 871 requires that the threat upon which the indictment is based be "knowingly and willfully" made, and this Court has held that it must be a "true threat," Watts v. United States, 394 U.S. 705, 708.

Whether statements constitute a "true threat" is primarily a question of fact to be determined by the fact finder under the appropriate legal standard. In this case the jury was instructed as follows (Tr. 177):

> A true threat, as required by the statute, is a serious threat and not words uttered as a mere political argument, idle talk or jest. The full context in which the words were spoken should be considered. This element is not established if the jury finds that the statement made is no more than a method of stating

political opposition to the President or if it is only words of dislike against a political party or its platform.

The jury was also instructed (Tr. 177-178):

> A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.
>
> Before you convict the defendant under this statute you must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States, and you must be further convinced beyond a reasonable doubt that the statement was not the result of mistake, duress or coercion. However, the statute does not require proof that the defendant actually intended to carry out the threat to kill or harm the President.

Petitioner contends that the statements that formed the basis of his conviction were political hyperbole rather than "true threats" and that the district court erred in instructing the jury that the existence of a "true threat" is determined by application of the "apparent determination" test.[3/]

The existence of a "true threat" is an issue which cannot be resolved solely by consideration of the statement alone, but must be considered in the context of the circumstances surrounding its utterance. The critical finding is

---

3/ To the extent petitioner contends that 18 U.S.C. 871 is unconstitutional on its face, such a contention is without merit, as this Court held in Watts v. United States, supra, 394 U.S. at 707.

whether the statements would be interpreted by reasonable men "as a serious expression of an intention to inflict bodily harm upon or take the life of the President." United States v. Compton, 428 F.2d 18, 22 (C.A. 2), certiorari denied, 401 U.S. 1014; Roy v. United States, 416 F.2d 874 (C.A. 9); United States v. Lincoln, 462 F.2d 1368 (C.A. 6), certiorari denied, 409 U.S. 952; United States v. Hart, 457 F.2d 1087 (C.A. 10), certiorari denied, 409 U.S. 861.

Petitioner's contention that conviction under 18 U.S.C. 871 requires proof of actual intent to harm the President is, we submit, unsound. Although this Court expressed doubts about the apparent determination test in Watts, supra, that test is, in our view, consistent with the purposes of the statute and not violative of the First Amendment. As the court of appeals noted in Roy, supra, one of the purposes of the statute is to prevent the restrictive effect that a "true threat" may have on the movements of the President and the free exercise of his responsibilities. That evil exists independently of the subjective intention of the person uttering the threat.

We disagree with petitioner's contention that the decision below is in conflict with United States v. Patillo, 438 F.2d 13 (C.A. 4). In Patillo, a divided en banc court held that in cases involving threats not intended to be communicated to the President, proof of actual intent to carry out the threat is required for conviction. Although it is not completely clear whether the Fourth Circuit would require proof of actual intent to harm the President in the circumstances of this case, we believe that it would probably treat this case as not

requiring such proof. The court summarized its holding in Patillo as follows (433 F.2d at 16):

> "We think that an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements, and that the trier of fact may find the latter intention from the nature and publication of the threat, i.e., whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President."

Here petitioner could not only anticipate that his threats would be transmitted to law enforcement officers, indeed, he directly communicated the threats to Officer Page at the Holiday Inn without disclaiming his apparent resolve to carry out the threats. Petitioner's conduct is more similar to the anonymous communication of threats to a telephone operator involved in United States v. Roy, supra, cited with approval by the majority in Patillo, than to the facts of Patillo which involved a statement by a civilian security guard to a co-worker.

While we believe that the Fourth Circuit would probably not require proof of actual intent in this case, we also note that we agree with the dissenting opinion of Judge Haynesworth that the majority opinion in Patillo introduces an unmanageable and inappropriate classification into prosecutions under 18 U.S.C. 871.

2. The district court correctly instructed the jury, and, viewing the evidence in the light most favorable to the government (Glasser v. United States, 315 U.S. 60, 80), the jury was entitled to conclude that petitioner's statements constituted "true threats." The jury's verdict, however, presents a troublesome question not presented to the court of

appeals and not raised in the petition for certiorari. As noted earlier, the jury returned a verdict of "guilty with extreme mercy," after having been informed by the district court that it would accept such a verdict.

The transcript contains the following record of the acceptance of the verdict (Tr. 192-193):

> THE COURT: We understand from a note you sent to the court the verdict finds him guilty on all five counts but that you wish to recommend extreme mercy; is that correct?
>
> THE FOREMAN: Yes, your Honor.
>
> THE COURT: Will you please poll the jury. (Whereupon the jury was polled and all jurors answered in the affirmative.)
>
> THE COURT: Let the verdict be entered as the judgment of the Court. Certainly the Court will take into consideration your recommendation of mercy, but before we can act upon the case, we will have the Probation Officer make a presentence investigation report. We do not know whether the man has a prior criminal record or not and we will certainly take into account what you have recommended.

Ordinarily, when a jury, without statutory authorization, makes a recommendation of mercy, the recommendation may be regarded as surplusage and it does not affect the validity of the verdict. See, e.g., Cook v. United States, 379 F.2d 965 (C.A. 5); Krull v. United States, 240 F.2d 122 (C.A. 5) (dictum), certiorari denied, 353 U.S. 915; Thlinket Packing Co. v. United States, 236 Fed. 109 (C.A. 9); United States v. Mankowski, 179 F.Supp. 667 (E.D. Wis.). In Cook, supra, however, the Fifth Circuit held that there is an exception to this general rule where the circumstances surrounding the recommendation of

-8-

leniency raise a question as to the unqualified nature of the verdict, and in such cases the verdict cannot be accepted without further inquiry.

In Cook the jury returned a verdict of guilty but with a notation that requested the court to give the defendant "* * * every degree of leniency possible." The jury was polled, with one juror stating that he was initially reluctant to convict, one juror responding "guilty", and ten jurors responding in substantially the following language: "Guilty, as noted at the bottom of the verdict." The defendant then requested that the jurors be asked whether their guilty vote was qualified by the recommendation of mercy. The trial court refused to make further inquiry, and on appeal the Fifth Circuit reversed.

The present case is distinguishable from Cook in that no member of the jury indicated any reluctance to vote for conviction, and, in addition, the court, before polling the jury, described the verdict as a finding of guilt with a recommendation. The foreman agreed with that description and the jury unanimously affirmed the verdict. While a recommendation of leniency can present troublesome questions, we believe that, on balance, the verdict here was unqualified.

In any event, unlike Cook, here petitioner did not request further inquiry of the jury. Such inquiry must be requested prior to the recording of the verdict (Rule 31(d), Fed. R. Crim. P.) so that the court has an opportunity to correct any deficiencies in the verdict before the jury is dismissed. In failing to request a further inquiry, petitioner

waived any defects in the verdict. See, e.g., United States v. Marr, 428 F.2d 614 (C.A. 7); Hall v. United States, 402 F.2d 571 (C.A. 9), certiorari denied, 393 U.S. 1107; Jackson v. United States, 386 F.2d 641 (C.A.D.C.); United States v. Neal, 365 F.2d 183 (C.A. 6).[4/]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1974.

4/ Petitioner also challenges the propriety of counts 4 and 5 of the indictment, which were based on statements made by petitioner to police officers. While counts based on statements made in response to interrogation by police officers and merely descriptive of prior events and utterances would be troublesome, the transcript suggests that, at least as to count 4, the statement was made as an affirmation and was not simply reportorial. In any event, since petitioner received concurrent sentences on each count, there is no need for this Court to consider this issue. See United States v. Barnes, 412 U.S. 837, 843, n. 16.